

Article 37
Disciplinary and Adverse Actions

Section 1: The Agency and the Union recognize that the public interest requires the maintenance of high standards of conduct. The Parties collectively agree that the purpose of any disciplinary action is to correct or improve employee behavior and to maintain discipline within the workforce. All disciplinary actions will be taken only for just and sufficient cause. Suspension for more than fourteen (14) days, removals, reductions in grade or pay, and furloughs of thirty (30) days or less will be taken for such cause as will promote the efficiency of the service.

- A. Where applicable, the Parties agree to the philosophy of progressive discipline.
- B. Whenever possible, disciplinary actions will be conducted privately and in such a manner as to avoid embarrassing the employee.
- C. Disciplinary and adverse actions will be initiated as timely as possible after the offense is committed or Management becomes aware of the offense.

Section 2: Definitions.

- A. An informal action is non-punitive in nature and includes closer supervision, oral admonishment or a letter/memorandum of warning.
- B. An adverse action is a formal disciplinary action consisting of a suspension of more than fourteen (14) calendar days, a reduction in grade or pay (as defined in 5 C.F.R. 752.402), a furlough of thirty (30) calendar days or less, and removal.
- C. A formal disciplinary action is a suspension of fourteen (14) calendar days or less and letters of reprimand.
- D. Performance-based actions and RIF actions are neither disciplinary nor adverse actions.
- E. Where there are calendar based deadlines for action by the Agency, the Union, or individual bargaining unit employees, and the last day falls on a day which the official duty station is closed (weekends, holidays, emergency closures, etc.) the deadline shall be the next business day in which the official duty station is open.

Section 3: Informal Actions.

- A. The supervisor or appropriate management official shall advise the employee of the specific infraction or breach of conduct, and give the employee the opportunity to explain his/her side of the matter and, if warranted, an oral admonishment will outline what steps are necessary to preclude a recurrence. The employee will be provided reasonable time

to seek union representation if requested. It is understood that it is the employee's obligation to make such a request.

B. Letter/memorandum of Warning consists of a description of the misconduct, an outline of positive corrective steps, and state what penalty might result if the actions continue.

C. Since this section deals with informal actions which are not disciplinary in nature, the Agency will not cite any records regarding such an informal action beyond eighteen (18) months in any subsequent disciplinary action which might occur. The only exception is where, in the interim period, an action for a like offense has been issued.

Section 4: Disciplinary Actions.

A. Before issuing a letter of reprimand, the supervisor or appropriate management official must fully discuss the incident in question, with the employee to permit the employee to present his/her side of the situation. If after the employee presents his/her views, the supervisor or appropriate management official considers a reprimand to be warranted it will be issued to the employee in writing by the immediate supervisor or appropriate management official not less than two (2) work days after the discussion. The letter will state the employee's right to be represented by an attorney or other representative, including the Union. The employee will be given five (5) business days to provide a written response to the reprimand. The employee shall be authorized a reasonable amount of official time to prepare a response. This response will be included in the employee's file with the reprimand if so requested. Letters of reprimand will be maintained in an employee's Official Personnel Folder for up to two (2) years.

B. Any suspension of fourteen (14) days or less must be preceded by a written proposal notice at least fourteen (14) calendar days before the discipline is to be effected. The employee will be given ten (10) calendar days in which to provide the deciding official a response either orally, in writing, or both. Advance notices will specify the deciding official to whom the employee should provide any reply. The notice will state the employee's right to be represented by an attorney or other representative, including the Union. The employee shall be authorized a reasonable amount of official time to prepare a response.

C. The employee shall be provided with an additional copy of all disciplinary actions marked "COPY for EMPLOYEE's REPRESENTATIVE".

Section 5: Adverse Actions. All adverse actions with the exception of C and D below, must be preceded by written notice at least thirty (30) calendar days before the intended effective date. Employees will receive at least fifteen (15) calendar days to provide the deciding official a response, either orally, in writing or both and to furnish affidavits or other evidence in support of the answer. Employees shall be granted a reasonable amount of official time to prepare the response. The notice will state the employee's right to be represented by an attorney, or other

representative, including the Union. The deciding official or designee will consider requests for extensions of time, and may grant them where he/she believes the request reasonable.

A. The advance notice shall inform the employee of the right to review the material management is relying upon to propose the action.

(1) If supervisory notes are kept on employees, the notes will be maintained in a secure fashion and disclosed only to those officials with a need to know. Supervisory notes, or the applicable portion thereof, used to support a disciplinary or adverse action are to be made available to the employee upon request, as soon as practicable.

(2) The Agency may redact any material reviewed or supplied to the employee/representative, consistent with legal or regulatory requirements. If management is relying upon witness statements, the Agency will provide the identity of the witness(es), and any witness statements.

B. The notice of proposal will specify the Agency official who will hear the employee's answer and make a decision on the proposal. The official will normally be the next higher level official in the proposing official's chain of command, unless the proposing official is the Deputy Administrator, or Administrator of the Agency. If the employee chooses to make an oral reply, the reply will be made at the deciding official's work location, unless agreed otherwise. In cases where the employee and deciding official work at different locations, but within the same commuting area, the employee will travel to the deciding official's work location, unless agreed otherwise. When the two are in different commuting areas, the oral reply will be made by video or telephone conference, unless agreed otherwise. The deciding official or his/her designee, will summarize the oral reply, if any, and include it in the case file. If the employee chooses he/she may provide a summary to be included in the case file.

C. In cases of proposed adverse action when the Agency has reasonable cause to believe that the employee has committed a crime for which a sentence of imprisonment may be imposed, and the Agency determines it to be in its best interest, no advance notice is required.

D. An advance written notice and opportunities to respond are not necessary for furlough without pay due to unforeseeable circumstances, such as acts of God, or sudden emergencies requiring immediate curtailing of activities. Management agrees that such furloughs will be an act of last resort. When Management has the authority to do so, excused absence may be granted, as appropriate.

E. The employee shall be provided with an additional copy of disciplinary actions marked "COPY for EMPLOYEE'S REPRESENTATIVE."

Section 6: Decisions. The decision will be provided in writing to the employee and will specify the charges sustained and the penalty imposed. The decision will include the rights of appeal available to the employee and will notify him/her of the right to designate a representative, including the Union.

The Agency will consider the following factors when making a final determination on the appropriateness of a penalty in an adverse action case. The proposing and deciding official must review each case individually and apply those factors that are relevant. The factors may or may not weigh in the employee's favor:

- A. The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional, technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
- B. The employee's job level and type of employment, including any fiduciary role, contact with the public, and/or prominence of the position;
- C. The employee's past disciplinary record;
- D. The employee's past work record, including length of service, job performance, ability to get along with fellow workers, and dependability;
- E. Any effect of the offense upon the employee's ability to perform at a fully successful level and its effect upon the supervisor's confidence in the employee's ability to perform assigned duties;
- F. Consistency of the penalty with those imposed upon other employees for the same or similar offenses;
- G. Consistency of the penalty with the penalties in the Agency's conduct and discipline order;
- H. The notoriety of the offense or its impact upon the reputation of the Agency;
- I. The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
- J. Potential for the employee's rehabilitation;
- K. Aggravating or mitigating factors surround the offense, such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice, or provocation on the part of others involved in the matter; and
- L. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

Section 7: Removal from the work place pending a decision.

Under ordinary circumstances, an employee whose removal has been proposed will remain in a duty status in the position of record during the advance notice period. In circumstances in which the Agency reasonably believes that the employee's continued presence in the work space during the reply period poses a threat to persons or property, or otherwise jeopardize Government interests, the Agency will consider the following alternatives prior to placing the employee in a paid, non-duty status:

- (1) Assigning the employee to duties where the perceived threat no longer exists;
- (2) Placing the employee on leave, with his/her consent; or
- (3) Carrying the employee in the appropriate status if he/she is absent for reasons not originating with the Agency.
- (4) If none of these alternatives are selected, the Agency may place the employee in a paid, non-duty status during all or part of the advance notice period, as consistent with law or regulation.

Section 8: Employees may only grieve a disciplinary action through the Negotiated Grievance Procedure (NGP). Employees may appeal adverse actions to the Merit Systems Protection Board (MSPB), or file a grievance under the NGP, but may not do both. Once an employee has elected to file an MSPB appeal or a written grievance under the NGP, the employee may not change subsequently to the other procedure.

Section 9: In lieu of rendering a decision on a proposed action a deciding official may choose to offer an employee a settlement agreement, or access to ADR if locally established pursuant to Article 38 of this Agreement. Any settlement agreement may not conflict with the terms of this agreement. Any settlement talks which constitute "formal discussions" under 5 U.S.C. Chapter 71, may be attended by a Union representative pursuant to Article 5, Section 8 of this Agreement.

Section 10: This Article will be administered as required by law and in accordance with MSPB regulations. Where an employee appeals an adverse action through the negotiated grievance procedure and the Union proceeds to arbitration, the arbitrator is bound by the same rules governing the burden of proof and standards of proof that govern adverse actions before the Merit Systems Protection Board.

Section 11: The Parties recognize that the age of any evidence offered by any Party may be a factor detracting from its credibility and that as such, such evidence may lose its probative value.

